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No. 80-1884

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MEMOREX CORPORATION, *et al.*,
Petitioners,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. This Protracted Litigation Has Resulted In Unanimity Of Decision — Not Conflict.

Before the Court is the coda to one of the most needless and costly litigations in the history of the federal courts. It began with *Telex Corp. v. IBM,* filed in 1972, and tried for 29 days in 1973. Telex challenged a variety of product and pricing decisions announced by IBM in response to competition from Telex and other firms which had made a business of copying IBM's product designs, and offering their copies as replacements for IBM's most

popular computer "attachments."[1] After a court trial, decision was entered for the plaintiff. *Telex Corp. v. IBM*, 367 F.Supp. 258 (N.D. Okla. 1973). This was despite an express finding that IBM had not "reduced prices below cost and a reasonable profit." *Id.* at 306. The district court's judgment was reversed *per curiam* by the Tenth Circuit which held on the issue involved here that:

> "It would seem that technical attainments were not intended to be inhibited or penalized by a construction of section 2 of the Sherman Act to prohibit adoption of legal and ordinary marketing methods already used by others in the market, or to prohibit price changes which are within the *"reasonable* range up or down." *Telex v. IBM*, 410 F.2d 984, 927 (10th Cir.), *petition for cert. dismissed by stipulation*, 423 U.S. 802 (1975) [emphasis supplied].

Between the trial court decision in *Telex* and its reversal, this and four similar cases were filed in California by companies engaged in the same business as Telex. By a procedural miscarriage, each case was set down for separate trial.

The first such trial, *California Computer Products, Inc. v. IBM*, consumed 54 days and resulted in a directed verdict for IBM at the close of the plaintiff's evidence. The resulting judgment was affirmed on the ground that "[w]ere §2 interpreted not to exempt price cuts from attack under these circumstances, there could be no adequate guidelines for a jury to determine whether the prices at issue were *'reasonable'* ". 613 F.2d 727, 743 (9th Cir. 1979) [emphasis supplied].[2]

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1. The term "attachments" does not do justice to the sophisticated computer storage and retrieval devices involved in these cases, but the term fairly communicates the relationship that existed between IBM's entire product line and the plaintiff's selective reproduction of that product line.

2. Memorex asserts in its petition that "*CalComp* was settled and thus no Petition for Certiorari was filed." Petn. at 13. In fact, CalComp had not been settled when the plaintiff's time to file its petition for certiorari expired. IBM's cross-claim against CalComp for theft of trade secrets had been severed and remained to be tried. That claim was the basis of the continuing occasion for a settlement between the parties.

After the trial court decision in *CalComp,* and before the appellate decision, the same questions were tried to a jury in this case for 96 days. The jury deadlocked after 19 days of deliberation, and the trial judge subsequently granted judgment under Rule 50. *ILC Peripherals Leasing Corp. v. IBM,* 458 F.Supp. 423 (N.D. Cal. 1978). The judgment was affirmed in a three-paragraph *per curiam* opinion holding that this case cannot be distinguished from *CalComp Memorex Corp. v. IBM,* 636 F.2d 1188 (9th Cir. 1980).

While this case was on appeal, but before decision, *Transamerica Computer Co. v. IBM* was tried to a jury for 129 days. The jury again deadlocked and, by stipulation, the trial judge, sitting as the finder of fact, decided the case in IBM's favor. 481 F.Supp. 965 (N.D. Cal. 1979).[3]

Thus, the petition at hand is based upon a set of facts that has been tried and retried in four separate cases over a period spanning six years. These trials consumed over 300 court days. After each, the result has been the same. Six courts and twelve federal judges, passing on highly comparable trial records, have been unanimous[4] All have agreed that IBM was entitled to lower its prices in order to meet the lower prices being charged by its competitors where, without question, IBM's lower prices were fairly anticipated to return profits well in excess of IBM's total costs. In so holding, neither this case nor its several counterparts has decided a federal antitrust question "in

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3. *DPF, Inc. v. IBM and Hudson General Corp. v. IBM,* two of the five cases filed after *Telex,* were stayed and are currently inactive.

4. Circuit Judges Seth, McWilliams and Doyle of the Tenth Circuit in *Telex;* Circuit Judges Choy and Kennedy and District Judges Palmieri of the Ninth Circuit and Chief Judge McNichols sitting by designation in the Central District of California in *CalComp*; Circuit Judges Duniway and Goodwin, Judge Kashiwa of the Court of Claims of the Ninth Circuit and District Judge Conti of the Northern District of California in *Memorex* and District Judge Schnacke of the Northern District of California in *Transamerica.* This count does not include the denials of petitions for rehearing *en banc* in *Telex, CalComp* and *Memorex.*

a way in conflict with applicable decisions of this court" or with any other federal court. *Cf.* Supreme Court Rules, R 19.[5]

B. This Case Was Decided On The "Rule Of Reason" Standard Sought By Memorex.

The petition describes a false issue. It attempts to portray this case as a test of the validity of the so-called Areeda-Turner marginal-cost test of lawful pricing. In fact, it is no such thing. The IBM prices at issue here were shown by the undisputed evidence to be substantially profitable considering IBM's total costs, direct and indirect. As the Ninth Circuit put it in *California Computer*, this case "presents an *a fortiori* situation" as compared to Areeda-Turner. 613 F.2d at 743.[6]

Memorex also attempts to portray this case as a conflict between a *per se* and a "rule of reason" test for lawful pricing; but again, it is no such thing. The simple *fact* of the matter is that this case *was* decided on a "rule of reason" standard: "the test is whether the defendant's acts

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5. It is worth noting that Memorex is quite mistaken in the prayer for relief in its petition. Memorex asks this Court to remand for retrial, but no issue raised in the petition would justify that disposition. Memorex lost in the trial court on multiple grounds not raised here, including a failure to prove injury in an amount reasonably susceptible to calculation. The Ninth Circuit found it unnecessary to review the several additional grounds for affirmance of the trial court's judgment in view of the controlling impact of *CalComp*, but these grounds would have to be reviewed by the Court of Appeals before reversal of the district court's judgment would be warranted.

6. The undisputed evidence showed that, at the date of announcement, the estimated profitability of the IBM products involved in this case was as follows:

2319A	32%
2319B	31%
New Attachment Strategy	26%
3705	19%
FTP	20%

otherwise lawful, were *unreasonably* restrictive of competition." *California Computer Products Inc. v. IBM,* 613 F.2d at 736 [emphasis in original].

The petition cites numerous cases discussing the desirable limits or limitations of the Areeda-Turner doctrine. The suggestion is conveyed that this case somehow offers a vehicle to define those limitations, but it does not. What is notably lacking from the petition is citation of any case decided in this Court, or any other court, that would permit Memorex to recover a billion dollars in damages because IBM offered its consumers lower but profitable prices in response to competition from Memorex and others. As the Ninth Circuit capsulized the issue in *California Computer*:

> "The test of the reasonableness of the foregoing pricing actions, and the principal question facing us in this case, is whether IBM — which was the inventor and dominant supplier of the disk products in question — had the right to respond to the lower prices of its competitors with reduced, but still substantially profitable, prices on its own products. We conclude that it did." 613 F.2d at 741-42.

However much Memorex may seek to cloud the foregoing holding by dredging up the extended academic argument over the appropriate definition of "predatory" pricing, the fact remains that no court or agency has ever held that it could be unreasonable to offer profitable, competitive across-the-board prices beneficial to consumers.[7]

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7. The FTC decisions cited by Memorex as potentially contrary to the decision below actually support it. Thus, in *Borden,* the FTC acknowledges the validity of the Tenth Circuit's holding in *Telex,* (510 F.2d at 927), that the very prices in issue here were within the "reasonable" range. *In re Borden,* 92 FTC at 802-03. In *DuPont,* after reviewing the "series of cases involving marketing products of IBM," the Commission held that *DuPont* prices were "clearly" reasonable "absent at least some evidence of below-cost pricing, in view of the firm's cost advantage, its market position and its legitmate expansion efforts." *In re DuPont,* ..... FTC ....., CCH Trade Reg. ¶ 21,770 at 21,976 and 21,984. There is not a whisper of conflict between the decision in *DuPont* and the decision below.

Thus, in *Transamerica Computer Co. v. IBM*, 481 F.Supp. 965 (N.D. Cal. 1979) — after another exhaustive examination of IBM's prices — District Judge Schnacke (sitting as finder of fact) held that:

> "Even if [IBM's] prices had been slightly below cost, and their reasonableness thus open to inquiry, this Court would not hesitate to find them reasonable. The 2319s and Mandan were programs which reused third generation equipment at a time when [the] fourth computer generation had already been announced. That older equipment was soon to become obsolete, and it is reasonable for a manufacturer in such circumstances to reduce price and squeeze as much revenue as possible from equipment before demand dwindles.
>
> "Reasonableness is also indicated by comparisons between PCM's prices and IBM's. Such comparisons indicate that IBM's prices did not undercut the PCM's prices, they did not even equal them, they merely closed the gap; the PCM's prices were still lower." 481 F.Supp. at 1002.

In summary, regardless of scholastic debate over what sort of pricing might be deemed "unreasonable," *this case* does not involve any such issue.

It is remarkable that although the identical facts have been tried four separate times, each succeeding plaintiff has offered a new theory for claiming that the self-same IBM prices should be held unlawful. Indeed, Memorex itself has stressed a new theory at each stage of this case. In the trial court, Memorex focused on the contention that IBM's prices were not profit-maximizing in the short run; in the Court of Appeals, they were "limit prices"; and here, they fail to meet an amorphous "rule of reason" standard.

It is especially significant, then, that the legality of IBM's prices has been sustained in the face of every attack that the ingenuity of multiple counsel could muster. To contend on this record that the "reasonableness" of IBM's prices creates an important unresolved question of federal

law deserving the attention of this Court is to belittle the significance of the writ of certiorari.

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